SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 494

BROTHERHOOD OF RAILROAD TRAINMEN AND
A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AL G. RIVES,
Seventeenth Floor,
Twenty-One Twenty-One Building
Birmingham 3, Alabama,
Attorney for Petitioners.

CLARENCE M. SMALL, JR., AND
RIVES, PETERSON, PETTUS & CONWAY,
Seventeenth Floor,
Twenty-One Twenty-One Building,
Birmingham 3, Alabama,
Of Counsel for Petitioners.

E. L. MERRIHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN AND A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the adverse judgment entered by the United States Court of Appeals for the Fifth Circuit, whereby it affirmed the final judgment of the United States District Court for the Northern District of Alabama.

A.

OPINIONS OF COURTS BELOW AND OPINION OF ADMINISTRATIVE AGENCY.

The opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed has not been reported at the time of the printing of this petition. Copies of the following are appended hereto, pages A1 through A22, pursuant to Rule 23 (1)(i): the opinion of the United States Court of Appeals for the Fifth Circuit, the judgment, the opinion of the United States District Court for the Northern District of Alabama and the opinion of the First Division of the National Railroad Adjustment Board ordering the reinstatement of Petitioner A. W. Davis.

B.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is invoked on the following basis:

1. The judgment entry of the United States Court of Appeals for the Fifth Circuit adverse to Petitioners was made on July 9, 1964.

2. Jurisdiction to review the judgment or decree in question by Writ of Certiorari is conferred on this Court by virtue of Title 28, U.S.C.A., §1254 (1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C.

QUESTION PRESENTED FOR REVIEW.

The question presented for review by this petition may be stated as follows:

1. Under Section 3 First (m) of the Railway Labor Act, awards of the National Railroad Adjustment Board are final and binding on both parties to the dispute except insofar as they contain a money award. In view of this provision, is an award of the Adjustment Board requiring a railroad to reinstate a discharged employee enforceable in the United States District Court without review on the merits by trial *de novo*.

D.

THE FEDERAL STATUTES INVOLVED.

Several statutes are involved and, because of their length, only the citations are included here with the texts of the same being set forth in the appendix:

28 U.S.C.A., §1337.
45 U.S.C.A., §151(a).
45 U.S.C.A., §153(i) through (p).

Because the interpretation of Section 3, First (m) of the Railway Labor Act [45 U.S.C.A., §153(m)] is particularly involved, it is set out both at this point and in the appendix:

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and *the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.*

In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." [Emphasis added].

E.

STATEMENT OF THE CASE.

Petitioner A. W. Davis, a member of the Petitioner Brotherhood of Railroad Trainmen, was discharged from the service of the Respondent, Louisville and Nashville Railroad Company, on January 9, 1959, because of his alleged violations of certain operating rules of the Respondent which violations, Respondent contended, contributed to cause a collision between two freight trains at Peterman, Alabama, on December 11, 1958 (R. 30, 73, 95). The engineer operating the train which collided with the rear of that train on which Petitioner Davis was conductor was given only a 60 day record suspension for his part in the collision (R. 30). Petitioner Davis processed a grievance through the proper personnel of the Respondent alleging that he was discharged without just cause and therefore in violation of Article 31, Collective Bargaining Agreement (R. 30, 81, 100, 667). The matter was submitted to the National Railroad Adjustment Board on the transcript of testimony given at the investigation of the collision conducted by Respondent and certain photographs of the collision (R. 571 through 666). On February 17, 1961, the First Division of the National Railroad Adjustment Board, finding that the discharge of Petitioner Davis was discriminatory and arbitrary and, therefore, violative of the Collective Bargaining Agreement, sustained the claim of Petitioner Davis and ordered that he be reinstated to the service of the Respondent with seniority unimpaired and with a record suspension of 60 days and ordered that he be paid for all time lost (R. 30, 70).

The Respondent refused to comply with any portion of the aforesaid award and order and this action was instituted by the filing of a petition in the United States District Court for the Northern District of Alabama seeking to compel compliance therewith (R. 19).

Jurisdiction is conferred on the United States District Court by the Railway Labor Act, 45 U.S.C.A., §153, and by Title 28, §1337, of the United States Code, giving district courts jurisdiction of any civil action or proceeding arising under Acts of Congress regulating commerce. 28 U.S.C.A., §1337.

On proof of the contents and entry of the aforesaid award and order, Petitioners filed a motion for partial summary judgment seeking enforcement, without review on the merits, of that portion of the award ordering the reinstatement of Petitioner Davis (R. 83, 84, 101, 108). As a ground for said motion, Petitioners relied on Section 3, First (m) [45 U.S.C.A., §153(m)] of the Railway Labor Act which provides, in part, that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award" (R. 108). Petitioner's motion was denied by the Trial Judge who ordered a trial *de novo* before a jury on the merits of the award (R. 111, 116). The sole question tried and submitted to the jury on the trial *de novo* was the correctness of the award of reinstatement which, of course, depended on whether or not the discipline imposed by Respondent was justified in view of Article 31 of the Collective Bargaining Agreement prohibiting the discharge of employees without just cause (R. 559 through 570, 667).[1] The jury returned a

1. After the Trial Judge had ruled that the entire award, both as to reinstatement and back pay, was reviewable *de novo*

verdict for the Respondent and judgment was entered thereon (R. 124, 125, 126). Petitioners filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict alleging as error the review by trial *de novo* of the merits of the award of reinstatement, which motion was overruled (R. 126, 130). Petitioners then perfected an appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment in the District Court holding that the merits of a non-money award of the National Railroad Adjustment Board were reviewable by trial *de novo* in a suit for enforcement under the Railway Labor Act (R. 131, 672, 682).

F.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A Writ of Certiorari should be allowed in this case for the reasons that (1) the decision of the Court of Appeals conflicts with the principles of applicable decisions of this Court, and (2) the Court of Appeals has decided an important question under the Railway Labor Act which has not but should be settled by this Court.

The decision of the Court of Appeals that non-money awards of the National Railroad Adjustment Board are reviewable on the merits by trial *de novo* is contrary to the principles of applicable decisions of this Court. In *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), this Court held that a union could

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on the merits, the parties agreed to submit to the jury only the question of reinstatement reserving to the Court to later decide, without intervention of a jury, the issue of a monetary award if any were due (R. 120, 123)

not strike to enforce a money award of the Adjustment Board because the grievance process prescribed by the Railway Labor Act was not regarded as complete until enforcement of this type award was sought in the Court under Section 3, First (p), 45 U.S.C.A., §153 (p). In reaching this decision, it was recognized by the majority that a distinction existed between money and non-money awards of the Board insofar as their finality was concerned. At page 40 this Court said:

> "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, an issue wholly separable from the merits of the wrongful discharge issue. This, then, is clearly a controversy concerning a 'money award' as to which decisions of the Adjustment Board are not final and binding."

Mr. Justice Goldberg, with whom Mr. Justice Douglas joined, dissented from the opinion of the majority expressing the view that denial of the right to strike in the situation presented foreclosed the use of a traditional weapon available to the employee, and thus, resulted in an "unevenhanded" application of the statute. He argued that had the employee lost before the Board, its action would have precluded further review of the matter, while the carrier by mere inaction could compel a complete retrial of the issues involved in the money award. In expressing this view, Justice Goldberg also discussed the distinction between money and non-money awards and the type of judicial review to be afforded each under the Act:

> "[W]e are dealing not with a non-money award which is made specifically 'final and binding' by the statute, but with a money award which, as the majority recog-

> nizes, is governed by different considerations and is treated differently in the statute itself. A money award by the Board is expressly declared by the Act *not* to be 'final and binding'. The enforcement machinery contained in subsection (p) of the Act—which the Court's opinion inferentially suggests is confined to money awards, and which I would expressly declare to be so limited—contemplates for such awards not that limited type of review applicable to 'final and binding' non-money awards, but a de novo trial before the court, subject only to the limitation, as the statute requires, that the findings of fact of the Board shall constitute 'prima facie' evidence." (p. 43).

In a footnote to his opinion Mr. Justice Goldberg discussed the inapplicability of the *prima facie* evidence rule in paragraph (p) to non-money awards made final and binding by paragraph (m) where he said:

> "A common sense and practical reading of the statutory provisions seems to me to compel the conclusion that subsection (p) is confined in its application to money claims. Subsection (m) makes all non-money awards 'final and binding' and any reading of subsection (p) which allows de novo review of the merits of such awards would be directly contradictory of the effect expressly accorded to them." (p. 43).

Thus, although the majority and dissenting opinions disagreed on the question of whether or not the right to strike was available as a means of enforcing a money award, they did apparently agree that money and non-money awards were treated entirely different under the statute insofar as their finality is concerned. In the earlier decision of *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), Justice Black, delivering the opinion of the Court, noted the distinction between a reinstatement order and a money

award and the judicial review applicable to each when he stated:

> "The board cannot only order reinstatement of the employees, should they be actually discharged, but it can also under §3, First (o) and (p) grant a money award subject to judicial review. . . ." (p. 566).

This Court has expressed the utmost confidence in the ability of the National Railroad Adjustment Board to finally determine grievances of the type here involved as well as other disputes within the railroad industry. The Board has been characterized as "peculiarly competent" and "well equipped to exercise its Congressionally imposed function", because its members understand railroad problems and speak the railroad jargon. *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950). This confidence has been demonstrated in several decisions which have had the effect of increasing the authority of the Board while restricting that of the Court. In *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), and *Order of Railway Conductors* v. *Southern Railway Company*, 339 U.S. 255, 70 S. Ct. 585, 94 L. Ed. 811 (1950), this Court held that state or federal courts have no power to adjudicate disputes involving the interpretation of collective bargaining agreements when the National Railroad Adjustment Board has not acted. In the limited instance where the Court is allowed to act when the Board has not, the Court's interpretation of the bargaining agreement is not binding on the Board. Under the case of *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941), a discharged employee may accept the Railroad's action in terminating his em-

ployment as final and sue for damages in the courts as opposed to seeking reinstatement and back pay before the Board, assuming state law does not require him to exhaust his administrative remedies. *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953). However, if the Court in handling such a case must consider some provision of the collective bargaining agreement, its interpretation has no binding effect on future interpretations of the same or similar agreements by the Board. *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953); *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950).

In *Pennsylvania Railroad Company* v. *Day*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959), this Court held that the Adjustment Board had exclusive primary jurisdiction over disputes between railroads and active or retired employees and ordered a suit filed by a retired employee who had not processed his claim through the Board dismissed for lack of jurisdiction.

In *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959), it was held that a discharged employee who received an adverse determination of his claim for reinstatement and back pay before the Board was precluded from later pursuing his common law remedy for damages. This Court held that the denial of a money claim was not a money award reviewable under the provisions of subsection (p) and, therefore, under subsection (m) the decision of the Board was final and binding on the employee.[2] The rea-

2. In response to the contention of the dissenting Justices that the denial of a money claim is a money award reviewable under subsection (p), the majority recognized the disparity in

soning of the majority was that failure to give the intended effect to the final and binding provisions of subsection (m) would be to say that the function of the Board was only to render advisory opinions, a contention wholly inconsistent with the Act's terms, purposes, and legislative history.

The result is that an active or retired employee or a discharged employee residing in a state which requires the exhaustion of administrative remedies has no choice of forum in which to settle his grievances but must submit them to the Adjustment Board. If the determination by the Board is adverse, under the *Price* case, *supra*, the employee cannot obtain judicial review of his claim because non-money awards are made final and binding by subsection (m). 45 U.S.C.A., §153 (m). Are non-money awards any less final or any less binding when the employee is successful before the Board? The Act states that such awards are final and binding on "both" parties to the dispute. 45 U.S.C.A., §153 (m).

The restriction enunciated in the above cases against judicial review of grievances and disputes within the jurisdiction of the Adjustment Board is in accord with the strong federal policy of final settlement of labor disputes by arbitration set out in the so-called Steelworker's Trilogy. *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America*

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judicial review which Congress had created in the case of a money award, but did not indicate, as some contend, that Congress intended that non-money awards receive the same treatment.

v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). In the *Enterprise Wheel and Car* case, *supra*, where the arbitrator ordered reinstatement with back pay for certain discharged employees under a collective bargaining agreement providing that awards of the arbitrator will be final and binding on the parties, the Court of Appeals differed with the arbitrator's construction of the collective bargaining agreement and refused to enforce the award. This Court reversed stating:

> "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. (p. 596).
>
> * * *
>
> "This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." (p. 599).

In *United Steelworkers* v. *American Manufacturing Company, supra*, Mr. Justice Douglas speaking for the majority enunciated this view in even stronger terms when he said:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." (p. 568).

In the *Warrior and Gulf Navigation Company* case, *supra*, the Court made clear the reason for this Federal policy by referring to what it termed "the common law of the shop". The Court said that the arbitrator's source of law was not confined to the express provisions of the collective bargaining agreement but was tempered by his knowledge of the practices of the industry. Justice Douglas writing for the majority said at page 582:

"The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

The contractual provision concerning the finality of the arbitration awards in the Steelworker's Triology is found in almost identical form in Section 3 First (m) of the Railway Labor Act with the exception that subsection (m) excludes money awards. 45 U.S.C.A., §153 (m). Since the submission of disputes to the Adjustment Board is not by agreement, the purpose in excluding money awards from the final and binding provisions of subsection (m) undoubtedly was to avoid the denial of the right to trial by jury in suits claiming money damages. In the case of non-money awards, however, the scope of judicial review should be no greater than that permitted in the above discussed cases. This is the view adopted by Mr. Justice Goldberg in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), where he states as a part of the opinion previously discussed:

"The logic of Chicago River is that 'final and binding' awards of the Adjustment Board are enforceable in favor of, or against, either the employer railroad, the union, or the grievant employee in the federal courts. Given the premises of Chicago River, it must follow that such enforcement proceedings are governed by federal law as declared by this court in cases such as . . . [The Steelworker's Triology.] . . . and, of course, that the merits of such awards are not subject to de novo consideration upon a petition for judicial enforcement."

The precise question of whether a non-money award of the Adjustment Board *favorable* to an employee is reviewable on its merits by trial *de novo* in a suit for enforcement has never been decided by this court. The determination of this important question is vital to the effectiveness of the Board in the disposition of grievances within the industry. If the decision of the Court below is allowed to stand then the final and binding provision of Section 3, First (m) is rendered meaningless to the employee who is successful before the Board but remains a bar to the employee whose claim is denied by the Board. Such a disparity of judicial review is conceded to exist in the case of a money award, but there is no statutory requirement that it be extended to a non-money award. The failure of the Courts below to give any effect to the final and binding provision of Section 3, First (m) relegates the Award of the Board to an advisory opinion, a result wholly inconsistent with the terms, purposes and legislative history of the Railway Labor Act. *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959); 45 U.S.C.A., §§151a, 153 (m).

CONCLUSION.

One of the principal purposes of Congress in creating the National Railroad Adjustment Board was to prevent the disruption of commerce by providing for the prompt and orderly settlement of disputes growing out of grievances. 45 U.S.C.A., §151a. If non-money awards are subject to a complete retrial on their merits in the District Courts then the settlement of grievances is far from prompt and the final and binding provisions of paragraph (m) are rendered meaningless insofar as any benefit to the employee in the adjustment of his grievance. Aside from

the temporary procedural advantage which he obtains under the *prima facie* evidence rule of paragraph (p), the discharged employee's prospect of eventual success in such a *de novo* "enforcement" proceeding is no better than it would have been had the dispute not gone to the Adjustment Board and had he filed suit in the District Court in the first instance. 45 U.S.C.A., §153 (p). Certainly, he could obtain a more prompt disposition of the matter and, if the statute is powerless to provide no more than what is probably only an "imagined" advantage under Section 3, First (p) then the logical forum is the Court, as opposed to the Board. 45 U.S.C.A., §153 (p).

Such was not the intent of the Congress, however, when it enacted the Railway Labor Act. The plain language of paragraph (m) and the decisions of this Court on the question are properly construed as preventing *de novo* review of the merits of non-money awards. We do not here contend that non-money awards are not reviewable in any degree. If it be established, for example, that the award of the Board was arbitrary or that one of the parties was not given notice or an opportunity to be heard, then we believe that such an award could be properly set aside by the Court. *Ellerd* v. *Southern Pacific Railroad Co.*, 241 F.2d 541 (C.A. 7th 1957). But to hold, as did the Court below, that the merits of a non-money award of the Adjustment Board, specifically made final and binding by paragraph (m) of the Act, are subject to *de novo* review on the merits by Court or jury runs contrary to the decisions of this Court, the purpose and language of

the Railway Labor Act, and a common sense handling of disputes within the Railroad industry.

Respectfully submitted,

.....,

AL G. RIVES,
Attorney for Petitioners.

CLARENCE M. SMALL, JR., and
RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel for Petitioners.

CERTIFICATE AS TO SERVICE.

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari properly addressed, to each of the following: Honorable James A. Simpson and Honorable Henry E. Simpson, Exchange Security Building, Birmingham, Alabama; and Honorable H. G. Breetz and Honorable M. D. Jones, L & N Office Building, 908 West Broadway, Louisville 1, Kentucky, all counsel of record for the respondent in the court below, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the ... day of September, 1964.

.....,

AL G. RIVES,
Attorney for Petitioners.

APPENDIX

APPENDIX A

Opinion of United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20715

BROTHERHOOD OF RAILROAD TRAINMEN and A. W. DAVIS,
Appellants,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(July 9, 1964.)

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and McRAE, District Judge.

TUTTLE, Chief Judge: This case arises from a petition to enforce an award of the National Railroad Adjustment Board requiring the Louisville and Nashville Railroad to reinstate and pay back pay to petitioner-appel-

lant A. W. Davis, a member of the Brotherhood of Railroad Trainmen. The Railroad discharged Davis for his part in a rear-end collision of two L & N freight trains within the yard limits of Peterman, Alabama, on December 11, 1958. Davis was the conductor stationed in the caboose of a half-mile long, southbound freight train. The Railroad charged that he failed to keep a proper watch and to place a flagman as required on the rear of the train during a back-up operation; the back-up ended when his train collided with another southbound freight. The engineer of the other freight was given a 60-day record suspension for his part in the collision.

Davis processed a grievance of his discharge through appropriate steps and the matter was submitted to the Board for its decision. The referee found that Davis was to some degree at fault but decided that his neglect was akin to that of the engineer on the other train and hence that the harsher discipline of Davis was discriminatory. Davis was ordered reinstated with pay for lost time and with all rights unimpaired but with a record suspension of sixty days. The Railroad refused to comply and enforcement was sought under 45 U.S.C.A., §153(p). The Brotherhood filed a motion for summary judgment in part seeking immediate enforcement of that portion of the award ordering Davis' reinstatement, but this was denied. The district court ordered a trial *de novo*, in which Davis' service record was admitted, on the merits of the award and a jury found for the Railroad on the issue whether Davis had been discharged for cause.

Appellants first specify as error the trial court's refusal to grant partial summary judgment enforcing reinstatement without review on the merits by trial *de novo*. They contend that such a review of non-money awards is barred

by 45 U.S.C.A., §153(m):—"[T]he awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." A similar contention has recently been rejected by this Court in *Jones* v. *Central of Ga. Ry.*, No. 20948, 5th Cir., May 6, 1964, where a summary judgment denying a petition to enforce an NRAB award of reinstatement and back pay was affirmed. The Court there noted the long line of cases which have consistently held that 45 U.S.C.A., §153(p),[1] conferring jurisdiction on the courts to enforce NRAB awards, gives the district court the power to conduct a *de novo* review of non-money awards of the NRAB. We shall therefore only set out the reasoning used to arrive at this result rather than attempting to examine all of the cases in the field.

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1. "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

In addition to the advantages of being able to select the venue for the suit and of having the weight of prima facie evidence given the Board's award, the petitioner is allowed by the section a reasonable attorney's fee if he prevails and access to the courts without liability for any court costs unless they accrue upon his appeal.

The enforcement provision, subsection (p), makes no distinction between money awards and non-money awards. It refers generally to "an order" of the Board with which the carrier refuses to comply. If any order of the Board is to be enforced in a district court, the procedure set forth in subsection (p) must be followed. The petition must set forth the causes for which relief is claimed as well as the order of the Board; the suit "shall proceed in all respects as other civil suits;" the Board's order is only to be "prima facie evidence of the facts therein stated;" and, finally, the court may make the appropriate order to enforce or set aside the order. From these it is apparent that a trial *de novo* on the merits is contemplated. See *Thomas* v. *New York, C. & St. L. Ry.*, 185 F.2d 614, 616 (6th Cir. 1950); *Dahlberg* v. *Pittsburgh & L.E. R.R.*, 138 F.2d 121, 122 (3rd Cir. 1943). Although the award of the NRAB is to have some probative weight it is not to be legally conclusive even though it is a non-money award. See *Washington Terminal Co.* v. *Boswell*, 124 F.2d 235, 243 (D.C. Cir. 1941), *aff'd by an equally divided court*, 319 U.S. 732 (1943). The provision in section 153(m) that a non-money award is to be "final and binding" obviously has some limits—an award beyond the statutory authority of the Board would not be binding and no award can be enforced without the aid of the courts—see *Dahlberg* v. *Pittsburg & L.E. R.R.*, *supra* at 122; and construing subsection (m) in the context of the entire provision, including subsection (p), "final and binding" may be taken to mean that it is final so long as there is no effort to enforce the award under subsection (p), see *Cook* v. *Des Moines Union Ry.*, 16 F. Supp. 810, 813 (S.D. Iowa 1936).

> "The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes.

> Under both the Act of May 20, 1956, 45 U.S.C.A., §151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the boards had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 make the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable judicial decisions."

Dahlberg v. *Pittsburgh & L.E. R.R., supra* at 123, *quoted with approval in Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, 253 F.2d 753, 757 (4th Cir. 1958).

Appellants nevertheless argue that this widely approved construction is incorrect in light of certain language in *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963). The Supreme Court there held that where a carrier reinstated an employee in accord with an NRAB award but insisted, in complying with the back pay order, upon deducting amounts the employee earned from other employers, the union could be enjoined from striking to enforce its interpretation of the Board's award. In the course of the opinion the Court said:

> "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, an issue wholly separable from the merits of the wrongful discharge issue.

> This, then, is clearly a controversy concerning a 'money award,' as to which decisions of the Adjustment Board are not final and binding. * * *
>
> "* * * Congress has, in effect, decreed a two-step grievance procedure for money awards, with the first step, the Adjustment Board order and findings, serving as the foundation for the second. Money awards against carriers cannot be made final by any other means."

We would hesitate to overrule such a well-established precedent on the basis of dictum concerning an issue with which the Court expressly stated it did not deal; it certainly is not a clear mandate for a change. Moreover, we cannot agree that the language used compels the conclusion, as appellants contend, that the Supreme Court intends that a non-money award should be enforced without *de novo* review on the merits. The language in the above quoted passage merely paraphrases the statute; the Court reiterates that awards are final and binding except insofar as they contain a money award, as section 153(m) provides. The Court then refers to section 153(p) to find the mechanism for making a money award final. The fact that non-money awards are made final by a Board order whereas money awards are not, has not been questioned; this, however, does not touch upon the procedure for enforcement of the awards which the Court of Appeals authorities uniformly recognize must be a trial *de novo* on the merits for both types of awards. That the Supreme Court in the *Brotherhood of Locomotive Engineers* case did not intend to overturn these settled precedents may at least be inferred from the Court's two citations, 373 U.S. at 39, 41, with apparent approval of *Washington Terminal Co.* v. *Boswell, supra,* which is the landmark case for *de novo* review. See *Jones* v. *Central of Ga. Ry., supra.* We

recognize, of course, that two dissenting Justices drew the opposing inference from the Court's opinion. See 373 U.S. at 43 (Goldberg, J., dissenting).

To appellants' further argument that *de novo* review of non-money awards thwarts the policy of according finality to settlement by arbitration of labor disputes as expressed in the Steelworkers Trilogy, see, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), we state as did the Fourth Circuit in *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, *supra*, at 757-58:

> "If it had been intended * * * that the orders of the Board rendered pursuant to 45 U.S.C.A., §153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A., §§158 and 159 which relate to arbitration under 45 U.S.C.A., §157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

Appellants also specify as error the admission of Davis' service record in evidence before the jury. It is their position that the service record was not used in the Railroad's investigation and hence its admission at the trial was in violation of the collective bargaining agreement.[2] They urge that this record, which showed Davis

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2. "Article 31. Investigations and Discipline.

"1. Conductors will not be demerited, disciplined or discharged without just cause. When such action shall become necessary, the accused shall be * * * given an investigation by the proper officer of the Railroad, at which time all evi-

had been given a total of 195 days of record suspensions for twelve infractions over an eighteen-year period, prejudiced Davis in the eyes of the jury by showing he had been disciplined in the past.

At the outset we are puzzled by appellants' objection to the admission of the service record since attorney for appellants, before the hearing in the court below, moved for production of the service records of Davis and the engineer of the other train, swearing that they were pertinent to the issues in the case. Additionally, the pre-trial order states that all parties agreed that the issue to be decided was whether there was just cause for discharging Davis on the basis of the relative degree of fault of Davis and the engineer "as well as the previous record of each of them."

In addition to the apparent inconsistency of the positions of appellant, we find no error in the admission of Davis' service record. The issue to be decided was whether the discipline imposed was warranted, and certainly Davis' service record is evidence on the validity of his discipline. But appellants say it should be barred simply because of an alleged failure to comply with the procedure outlined for the Railroad's investigation. Yet as we pointed out above, section 153(p) provides for a trial *de novo* "in all respects as other civil suits," except for the special weight accorded the Board's order, and a trial *de novo* contemplates a trial of the entire controversy, including the introduction of evidence not limited to that brought in at the previous hearing. See, *e.g.*, *Spano* v. *Western Fruit Growers, Inc.*, 83 F.2d 150, 152 (10th Cir. 1936). Thus *Callan*

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dence in the case will be submitted. A proper record in the case will be kept, authenticated by both parties, and made the basis for any discipline that may be administered, or an appeal to a higher officer."

v. *Great Northern Ry.*, 299 F.2d 908, 913 and n.5 (9th Cir. 1961), approved a jury instruction stating that both sides have the right to introduce all available evidence on the correctness of an award. Moreover, *Butler* v. *Thompson*, 192 F.2d 831, 833 (8th Cir. 1951), made it clear that procedures set up in a collective bargaining contract for investigations and hearings before company officials do not apply when the statutory machinery for review before the NRAB is invoked. In the case at bar we find no essential unfairness in the admission of Davis' service record; the parties certainly must have known of it beforehand and the award of the Board, since it was based on the disparity of treatment of Davis and the engineer, highlighted the need to compare their respective service records. The contention that admission of the service record was error is without merit.

The judgment is AFFIRMED.

APPENDIX B

Judgment

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20715

D. C. Docket No. 10073 Civil

BROTHERHOOD OF RAILROAD TRAINMEN
and A. W. DAVIS,

Appellants,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and McRAE, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Brotherhood of Railroad Trainmen and A. W. Davis, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as mandate:

July 9, 1964

APPENDIX C

Opinion of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and A. W. DAVIS, Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation, Respondent.

Civil Action No. 10073

Invoking the jurisdiction of this court under the provisions of 45 U.S.C.A., §153 First (p), petitioners pray for the enforcement of Award 19,862, Docket 36,935 of the National Railroad Adjustment Board, First Division, entered February 17, 1961, by an appropriate judgment against respondent.

Motions for a summary judgment were filed in behalf both of petitioners and respondent. Each of such

motions was taken under submission and the court has had the benefit of oral arguments and briefs of counsel. For reasons hereinafter to be stated each is due to be denied.

On December 11, 1958, petitioner, A. W. Davis, was employed by respondent as Conductor on its Local Freight Train Number 55 while W. B. Merritt was the Engineer operating respondent's Local Freight Train number 53. On that date the two trains were involved in a serious and costly collision near Peterman, Alabama.

Respondent discharged Davis and disciplined Merritt only to the extent of a sixty-day record suspension. After reviewing the facts, the Board found Merritt's responsibility for the collision to have been akin to that of Davis. It concluded that the disparity between the disciplinary actions taken resulted in impermissible discrimination and that Davis' discharge was therefore arbitary. Davis' service record, disclosing previous disciplinary actions, was in evidence; Merritt's was not. The Board ordered Davis' reinstatement, with pay for all time lost and with all rights unimpaired, but with a record suspension of sixty days as of January 9, 1959.

The collective bargaining agreement then in force between the petitioning union and respondent provided, *inter alia*:

> "Conductors will not be demerited, disciplined, or discharged without just cause. . . ."

It is almost axiomatic that there is never just cause for the infliction of truly discriminatory punishment and the quoted provision of the contract would seem clearly to preclude it. *Cf. Textile Workers Union of America* v. *American Thread Co.*, 291 F.2d 894 (4th Cir. 1961). The

Board has consistently thus construed similar provisions in other railroad-union agreements. (See, *e.g.*, Awards No. 6785, 16930, 15315, 1140, 18037, 16576, 17398, 19901, 18114, and 9378.) While the Board's interpretations of such agreements are not binding upon the courts they are entitled to more than usual respect. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950); *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 556-57 (1959).

The burden of respondent's argument in support of its motion, conceding the validity of the foregoing proposition, is that there was an utter absence of evidence before the Board to support a conclusion of discrimination in the administration of discipline as between Davis and Merritt. Of course management has a right to take into account previous misconduct in determining appropriate disciplinary action the service record of Davis received in evidence disclosed twelve infractions of varying degrees of severity. Merritt's record was not before the Board and respondent's argument runs that the Board was bound to assume, as it did in its Award No. 5397 (Jan. 13, 1941), that such record was good.

Since respondent, by giving Merritt a sixty-day record suspension, recognized that he was not free from fault in the collision, it is difficult to understand why it did not offer his previous record to justify its disparate treatment of Davis. There is respectable authority declaring that under these circumstances it was under a duty to present such evidence. Disciplinary Hearings Under the Railway Labor Act: A Survey of Adjustment Board Awards, Vol. 46, *Minnesota Law Review*, No. 2, pp. 290, 307, 320-22 (December, 1961).

Be that as it may, since the trial in this court on the issues tendered by the petition and answer is *de novo*, the

court is of the firm opinion that the evidence offered in support of the respective motions for summary judgments shrieks of genuine issues of material facts to be resolved. Whether Davis was discharged without just cause would seem to be depend upon whether he was discriminated against after considering all of the evidence relevant to the degree of fault on the part of both Davis and Merritt as well as the previous record of each of them.

There remains the question, raised by the court at oral argument, as to the availability of a trial by jury, demanded by petitioners. The court is of the opinion that respondent's oral motion to strike such demand is due to be denied.

It seems clear that the Congress, in enacting a statute creating a right unknown to the common law, may provide a remedy by trial to the court without the intervention of a jury. The Seventh Amendment would have no application. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). While some of the reasoning by analogy in that opinion, which led Professor Moore to apply its principles to a suit to enforce an award of reinstatement and back wages under the Railway Labor Act (5 Moore, Federal Practice, Par. 38, 37 [3], at 301-02) may have been eroded by statements in *Dairy Queen* v. *Wood*, 369 U.S. 469, 30 LW 4300 (1962), further pursuit of that intriguing probability would be at best an academic exercise.

Here the right involved was created not by statute but by contract. *Thomas* v. *New York, Chicago & St. Louis R. Co.*, 185 F.2d 614 (C.A. 6, 1950). The Act fashions a remedy for its enforcement. The problem is to determine whether the Congress intended to preclude a jury trial. *Chappell & Co.* v. *Palermo Cafe, Inc.*, 146 F. Supp.

867, 868 (D. Mass. 1956). If it did not, no Seventh Amendment question is reached.

In *Meeker & Co.* v. *Lehigh R.R.*, 236 U.S. 412, 430 (1915), the Supreme Court assumed, if it did not explicitly hold, that in a suit brought under 49 U.S.C.A. 16, par. (2) to enforce a reparation award of the Interstate Commerce Commission a jury trial is demandable as of right. The provisions of 45 U.S.C.A. 153 First (p), enacted in 1926, are, for all practical purposes, identical. The conclusion to be drawn from such comparison is almost self expressive. See also: *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (dissenting opinion) [1959].

This is the 6th day of December, 1962.

(Signed) SEYBOURN H. LYNNE,
JUDGE.

APPENDIX D

Opinion of the First Division of the National Railroad Adjustment Board

Award 19862
Docket 36935

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

39 South LaSalle Street, Chicago 3, Illinois
with Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN
LOUISVILLE AND NASHVILLE RAILROAD
COMPANY

STATEMENT OF CLAIM: Claim of Conductor-Trainman A. W. Davis, Pensacola Sub-Division, for rein-

statement as conductor-trainman with seniority unimpaired and for pay for all time lost from the Carrier's service account dismissed without just cause, January 9, 1959."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

On December 17, 1958, carrier charged the crews of second class freight trains Nos. 53 and 55 with responsibility for a collision that occurred at Peterman, Alabama, on December 11, 1958. An investigation was held on this charge on December 20, 1958. On January 9, 1959, claimant Davis, the conductor on train No. 55, who had "engineered" a back-up movement of his train just before the collision, was dismissed from carrier's service; and Merritt, the engineer of train No. 53, which had been in forward movement before the collision, was given a record suspension of sixty days.

Carrier contends that claimant was mainly responsible for the accident because he was not alert and he failed to pull the emergency brake in his caboose before jumping to safety. Thus, says carrier, claimant disobeyed the following operating rules of carrier: General Notice; Rule B, first sentence; Rule 93, second paragraph, first sentence; Rule 103; Rule 108; and Rule 846.

As in all discipline cases, the Division's task here is to study the record of the investigation to discover whether substantial evidence therein supports carrier's disciplinary decision. If such evidence is judged lacking,

then carrier's decision may properly be held to have been arbitrary, capricious, or discriminatory.

In the instant case this task is made unusually difficult because of the numerous contradictions and conflicts in the testimony presented at the hearing and because of the omission of definite information on certain important points.

As to claimant's activities in the caboose of No. 55 during the backup movement before the collision, the only direct witness was claimant himself. The substance of his testimony is as follows: (1) As the northward back-up movement started, his flagman dropped off and walked toward his engine (presumably to later assist the head-end crew in picking up the loaded lumber car from the lumber company spur). (2) In the caboose claimant then stationed himself half-way between the north door of the caboose and the brake valve. (3) The brake valve was located "in the cupola in the center of the cab," but claimant "could have stepped easily to" said valve. (4) Claimant was watchful and had his train well under his control, being able to stop within one or two car lengths. The absence of back-up air hose on the rear platform of the caboose made only one-half car length difference in stopping ability. (5) Claimant heard No. 53's whistle and simultaneously saw it approaching around a curve about fifteen car lengths behind him. (6) No. 53 was coming "at an excessive rate of speed." (7) Upon seeing No. 53 coming, claimant "froze," then realized its speed, and decided that he did not have the time to take the "possibly five seconds" to pull the air and "still be able to get off the caboose before this engine ran through it." (8) Claimant jumped; and, "as soon as I hit I looked back and saw No. 53's engine as it struck my caboose."

As to the speed of No. 55 during the back-up movement, the testimony of both claimant and his head brakeman persuade the Division that the rate was about four miles per hour.

Petitioner makes a showing that, between the time when Claimant said he first saw No. 53 and the time of collision, No. 55's caboose moved about 70 feet. Then, at a speed of four miles per hour, which is 5.9 feet per second, claimant had about 11 seconds, from the time of seeing No. 53 until the moment of impact, in which to move from his position, pull the air, get to the platform, and jump. If his train's back-up speed was three miles per hour (4.4 feet per second), claimant had about 16 seconds in which to try to save both his train and himself. If the back-up speed was five miles per hour claimant had about nine seconds.

Would eleven seconds, the most probable amount of time, have been enough? Because of lack of information, the Division is unable to make a conclusive judgment. Some persons have slow reflexes and are paralyzed with indecision in the face of real or imagined imminent danger. Others have fast and immediate reaction times under almost any circumstances. The record affords no evidence of this sort about claimant, and in its absence the Division is not able to make a firm finding that claimant was, as carrier contends, not keeping an alert look-out when No. 53 first appeared, and was therefore negligent.

However, carrier's Rule 103, literally read, required that claimant's rear-end brakeman or flagman be stationed on the front of the caboose unless it be concluded that, as stated in the rule and its Note, claimant's backward-moving train was doing switching rather than making an extended movement within Peterman Yard.

Claimant permitted his flagman to drop off and walk back when the back-up began. The Division finds that, although the back-up was indeed part of the making up of No. 55, it was an unusual make-up and, because the head end crew had forgotten the lumber car, involved an extended rearward move of almost one-half mile, if completed. Therefore the exception to carrier's Rule 103 may not be said to be been applicable. And carrier properly found claimant guilty of violating said Rule.

This violation does not appear to have been merely technical. Claimant testified that he knew No. 53 was due. The presence of his brakeman could have insured against the possibility that claimant's own attention might have been somehow distracted from a careful rearward watch.

Carrier contends that claimant indeed did not keep a careful look-out and failed to see No. 53 until it was almost upon him. This contention of course is of major importance. As previously stated, no one but claimant could and did directly testify as to what claimant was doing in the caboose from the time the flagman dropped off until the time of the collision. But from the testimony of No. 53's crew carrier makes an inference or conclusion as to what claimant was doing. Said crew testified that from the moment they saw No. 55 their engineer had time to make a service application of their brakes, then an emergency application, and finally jump to the ground without injury. From this testimony carrier concludes that, if engineer Merritt had time to do those three things, conductor Davis would have had time to do two things—make his own emergency application and then leave his caboose. The Division finds that this conclusion or inference would be well-grounded if (1) claimant Davis' reac-

tion times were in general known to be as fast as those of engineer Merritt's; (2) his brake mechanism had been as accessible as that of Merritt's; and (3) he had been as habituated as Merritt to operating brake mechanisms. As to (1), the record provides no information. As to (2) and (3), there can be no doubt that Merritt's brake devices were much closer to his hand than claimant's, and his reactions had by experience been much more finely trained.

The conclusion from all of the foregoing must be that carrier succeeded in establishing only that claimant violated carrier's Rule 103 and thereby was in some unascertainable degree responsible for the collision of December 11, 1958. To this extent carrier's decision that claimant deserved some degree of discipline may not be judged to have been arbitrary or capricious.

The question remains, was the discharge, the supreme degree of discipline, merited? Or was this particular decision arbitrary, capricious, and discriminatory? This question has two prongs: (1) Was carrier's decision to dismiss claimant reasonably related to (a) the seriousness of the proven offense of violating Rule 103 and (b) claimant's past record? (2) Was said decision reasonably related to carrier's other decision, namely to give the other employe mainly involved, Engineer Merritt, a record suspension of sixty days?

As to the first prong, the Division would be reluctant to overturn carrier's decision. As to the second, however, there are persuasive reasons for doing so. This is to say, the record of carrier's investigation shows on balance that, as to the relative responsibilities of Merritt and claimant for the collision, carrier discriminated unreasonably against claimant and in favor of Merritt.

As previously stated, the record is full of conflicting testimony, especially that of No. 53's crew versus that of claimant. This Board has repeatedly said that it will not try to resolve such conflicts and that it will accept a carrier's evaluation and judgment if there is weighty evidence of record in support thereof. This is because the Division does not have the means for independently checking the evidence or for observing the witnesses. However, in the instant case the record itself contains information that warrants the Division's making its own evaluation—both of the conflicting testimony and of carrier's evaluation of same. Carrier presents two photographs of the wrecked cars in their post-collision positions. Claimant's backward movement was above found to have proceeded at the rate of about four miles per hour. The pictures show a completely smashed caboose and a pile-up of two empty gondolas and (partly) a box car over No. 53's engine. Much of the wood of the caboose was north of the front of No. 53's engine. The Division finds itself unable to conclude that this result could have obtained from No. 55's hitting the allegedly almost-stopped engine of No. 53, even though the brakes of the latter had been set in emergency. Carrier itself, according to the record, recommends a coupling of speed of four miles per hour. In the light of this evidence, the Division is compelled to conclude that the crew of No. 53 understated their speed, and Merritt's engine was not almost stopped at collision time; and accordingly, his responsibility for the accident was definitely not minor. Engineer Merritt and his crew had the same obligations to obey carrier's operating rules as had claimant and his crew, especially because No. 53 was in forward movement and was doing no setting out or picking up of cars at the time. In disciplining Merritt, carrier itself recognized these things.

Carrier disciplined Engineer Merritt only to the extent of a six-day record suspension. The Division finds his responsibility for the collision to have been akin to that of claimant's. Accordingly, the Division finds that carrier's action was discriminatory and in that sense arbitrary. The Division therefore is compelled to set aside carrier's discipline of claimant Davis. The latter shall be reinstated to carrier's service, with pay for all time lost and with all rights unimpaired; and carrier shall give him a record suspension of sixty days as of January 9, 1959.

AWARD: Claim sustained per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February 1961.

(The dissenting and supporting opinions of carrier and labor members are contained in the record at pages 38 and 65, respectively. Rule 231 (i).)

APPENDIX E

28 U.S.C.A., § 1337

§ 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

APPENDIX F

45 U.S.C.A., § 151a

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

APPENDIX G

45 U.S.C.A. § 153(i) through (p)

§ 153. National Railroad Adjustment Board

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjust-

ment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by

the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The Awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjust-

ment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.